STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

V.

DANNIE GAYHEART

Defendant-Appellant

ST. JOSEPH CIRCUIT COURT NO. 07-014245-FC

COURT OF APPEALS NO. 282690

SUPREME COURT NO. 139664

SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF PRIOR PROCEEDINGS

On March 30, 2007, the St. Joseph County Prosecuting Attorney authorized a Complaint charging Gayheart with homicide -- open murder, M.C.L. 750.316, and felony-murder. M.C.L. 750.316(1)(b).

On April 27, following a Preliminary Examination in 3-B District Court, Gayheart was bound over for trial in St. Joseph County Circuit Court.

On April 30, an Information was filed in St. Joseph County Circuit Court charging Gayheart as a fourth-time offender, M.C.L. 769.12, with these offenses.

On October 23, trial commenced in St. Joseph County Circuit Court before Hon. Paul E. Stutesman and a jury.

On October 31, the jury found Gayheart guilty of first-degree murder, M.C.L. 750.316(1)(a, and felony-murder

On December 3, Judge Stutesman sentenced Gayheart to life in prison on these convictions.

On December 18, Gayheart having requested appointment of appellate counsel on grounds of indigency on December 3, a Claim of Appeal was filed in St. Jo-

seph County Circuit Court. The Court of Appeals docketed it on December 20

On July 30, 2009, the Court of Appeals affirmed Gayheart's convictions. People v. Gayheart, 285 Mich. 202; 736 N.W.2d 330 (2009). He filed a *pro se* Application for Leave to Appeal with this Court on December 9. On March 12, 2010, this Court ordered oral argument on that Application.

STATEMENT OF FACTS

The facts are fairly set forth at pp. 1-10 of the Brief filed by Gayheart in the Court of Appeals.

ARGUMENT

I

IN A FIRST DEGREE MURDER CASE WHERE THE BODY WAS RECOVERED JUST ACROSS THE STATE LINE IN INDIANA, MAKING IT QUESTIONABLE WHETHER OR NOT MICHIGAN HAD JURISDICTION TO PROSECUTE, THE DEFENDANT'S PERSONALLY EXPRESSED DESIRE THAT JURISDICTION NOT BE CONTESTED DOES NOT FORECLOSE THE QUESTION FROM APPELLATE REVIEW BECAUSE LACK OF JURISDICTION IS A STRUCTURAL ERROR IN THE TRIAL.

Failure timely to assert a known legal right, even in a civil context, e.g., United Student Aid Funds v. Espinosa, 176 L.Ed.2d 158, 170-173 (2010, waives that right.

Procedural and substantive safeguards exist to protect the party entitled to them. He or she cannot sit back, take his or her chances at trial, and then belatedly invoke them on appeal if dissatisfied with the trial's outcome. Unless interposed at the appropriate point in the trial process,[1] a known legal right is forfeited.

Defects in arraignment procedure are an example of this in a criminal context. E.g., see People v. Arthur James Bridges, No. 275300, pp. 1-2 (Michigan Court of Appeals, July 10, 2008)(unpublished *per curiam* opinion)(copy attached as Exhibit B).

So is failure to bring the defendant to trial in timely fashion. E.g., see People v. Charles Lee Rogers, No. 288811 (Michigan Court of Appeals, April 15, 2010)(unpublished *per curiam* opinion)(copy attached as Exhibit C).

So is erroneous admission of a document not disclosed during discovery. E.g., see People v. Lapree Shaheb Gamble, No. 276034, p. 3 (Michigan Court of Appeals, June 10, 2008)(unpublished *per curiam* opin-

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[1] E.g., for an example where doing so salvaged a claim of error for appellate review, see People v. Stephen C. Grant, No. 284100, pp. 2-3 (Michigan Court

ion)(copy attached as Exhibit D). And cf. People v. Tyrone Lamont Wilson, No. 277572, pp. 1-4 (Michigan Court of Appeals, June 9, 2009)(unpublished *per curiam* opinion) (copy attached as Exhibit E)

So is an interpreter's failure to give a simultaneous, literal, and continuous translation of the proceedings. E.g., see People v. Scott Edward Hensley, No. 280781, pp. 1-2 (Michigan Court of Appeals, January 20, 2009)(unpublished *per curiam* opinion)(copy attached as Exhibit F)

So is the judge's failure to administer an oath to the venire before jury selection begins, E.g., see People v. Danny Lee Thompson, No. 284160, pp. 4-5 (Michigan Court of Appeals, August 25, 2009)(unpublished *per curiam* opinion)(copy attached as Exhibit G).

So is failure to object, prior to commencing jury selection, to the fact that the defendant is shackled in the courtroom. E.g., see People v. Jake William Jewell, No. 288442, pp. 3-4 (Michigan Court of Appeals, April 22, 2010)(unpublished *per curiam* opinion)(copy attached as Exhibit H). Contrast People v.

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of Appeals, October 6, 2009)(unpublished *per curiam* opinion)(Copy attached as Exhibit A)

Jerry Dowell Bailey, No. 283854 (Michigan Court of Appeals, August 6, 2009)(unpublished per curiam opinion)(copy attached as Exhibit I). Cf. also People v. Payne, 285 Mich. App. 181, 187; 774 N.W.2d 714 (2009).

So is failure to move, prior to trial, for severance of charges against the defendant. E.g., see People v. Donald Jamal Isom, No. 284857, pp. 5-6 (Michigan Court of Appeals, April 8, 2010)(unpublished *per curiam* opinion)(copy attached as Exhibit J).

So is failure to challenge the presiding judge for bias prior to commencement of trial, e.g. People v. Robert Kenneth Becker, No. 283573, p. 2 (Michigan Court of Appeals, December 15, 2009)(unpublished *per curiam* opinion)(copy attached as Exhibit K); People v. Jimmy Eric Green, No. 284301, pp. 3-4 (Michigan Court of Appeals, October 1, 2009)(unpublished *per curiam* decision)(copy attached as Exhibit L), or object to a mid-trial substitution of judges. E.g. see People v. James Stephan Zimmerman, No. 287895, pp. 1-3 (Michigan Court of Appeals, April 27, 2010)(unpublished per curiam opinion)(copy attached as Exhibit M).

So also would be failure to challenge allegedly improper venue before a case is submitted to the jury. M.C.L. 767.45(1)(c).

So also would be the prosecutor's failure to bring a state prisoner to trial within 180 days of being notified by the Department of Corrections of the facility where he or she is housed. M.C.R. 6.004(D).

So also would be defects in the procedure mandated by M.C.R. 6.302 for taking a guilty plea.

So also would be defects in the procedure mandated by M.C.R. 6.425(F) for sentencing convicted defendants.

The foregoing catalogue is meant to be illustrative rather than exhaustive. Because rights such as these are primarily for the defendant's benefit, he or she cannot allow them to lie fallow at trial.

On the other hand, certain procedural and substantive safeguards have as their primary objective protecting the integrity of the judicial process.

One example is a trial judge's failure to administer the oath required by M.C.L. 768.14 and M.C.R. 6.412(F) to the jury selected to try the case. People v. Timothy Lawrence Becktel, No. 289533 (Michigan Court of Appeals, March 4, 2010)(unpublished *per curiam* opinion)(copy attached as Exhibit N).

Another is a trial judge's failure to comply with M.C.R. 6.402(B) in obtaining a waiver by the defendant

of his right to jury trial. People v. Cook, 285 Mich. App. 420; 776 N.W.2d 164 (2009).

Such procedural and substantive safeguards do redound to the defendant's incidental benefit.

However, that is not their primary purpose. Their primary purpose is to obviate the reality or perception that trials are unfair. The intrinsically harmful nature of their absence or frustration at trial, People v. Duncan, 426 Mich. 47, 51; 610 N.W.2d 551 (2000), sires structural error[2] subject to automatic reversal.

Defendants need not object to preserve structural error for appellate review. It is plain on the face of the record within the meaning of People v. Carines, 460 Mich. 750, 763-764, 774; 597 N.W.2d 130 (1999), because it "affects the public reputation of judicial proceedings." People v. Thomas, 260 Mich. App. 450, 454; 678 N.W.2d 506 (2005).

A Michigan court's jurisdiction to try a defen-

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[2] "Structural errors are errors that affect the framework of the trial, infect the truth-gathering process, and deprive the trial of constitutional protections without which the trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." People v. Watkins, 274 Mich. App. 14, 26; 634 N.W.2d 370 (2001). See also People v. Miller, 482 Mich. 540, 556; 759 N.W.2d 850 (2008)

dant for criminal offenses is of this order of magnitude. As the Court of Appeals explained, People v. Gayheart, *supra*, 285 Mich. App. at 221-225, serious constitutional questions would arise if a criminal trial went forward in the absence of sufficient minimum contacts with Michigan.

Judge Stutesman, as well as the prosecutor, recognized this:

> THE COURT: ... Now the most difficult one: "Motion in Limine Regarding Jurisdiction." This again is the (sic.) brought by the Prosecutor and no response has been received from the defense. Mr. Grubbs, what's your position on this?
>
> MR. GRUBBS: Yes, sir. Your Honor, I have on several occasions discussed this motion with my client and my client has instructed me not to oppose this motion. Mr. Gayheart, you and I have discussed this jurisdictional motion on several occasions, is that correct?
>
> MR. GAYHEART: Yes, it is.
>
> MR. GRUBBS: And is it true that you Have instructed me not to oppose this motion?
>
> MR. GAYHEART: That's right.
>
> MR. GRUBBS: Okay. And is that your position here today?
>
> MR. GAYHEART: That's my position.
>
> MR. GRUBBS: Okay. And you realize that by not opposing it, it probably increases the likelihood that it's going to be approved, is that correct?
>
> MR. GAYHEART: That's true; that's correct.
>
> MR. GRUBBS: And you would be tried here in the State of Michigan?
>
> MR. GAYHEART: That's right.
>
> THE COURT: You're agreeable to that?
>
> MR. GAYHEART: `Yes, I am.

MR. GRUBBS: We did ...

THE COURT: Waiving any claim or argument later that the Court does not have proper jurisdiction over this case.

MR. GAYHEART: (Inaudible)

THE COURT: No, you're not claiming that, or yes, you are agreeing that you or -- you are agreeing to the jurisdiction of this Court to hear this case?

MR. GAYHEART: That's correct, sir.

MR. FISHER: May I respond to that?

THE COURT: Before -- I was only gonna say, I still think that we need an instruction to the jury that they have to find the -- elements under the statute are met. Even though he's waived this, I don't want this to come back later, ***because I don't think you can waive the Court's jurisdiction --***

MR. FISHER: ***You can't stipulate to jurisdiction.***

THE COURT: So ...

MR. GRUBBS: ***I'm not stipulating*** ...

THE COURT: All right ...

MR. GRUBBS: ... ***I'm merely not opposing it.***

THE COURT: ...so I think we're not gonna argue it now. But under the statute there has to be a finding that there is a material -- either that the murder occurred here or that there was a material factor[.]

* * *

Draft an order to that effect that -- that Mr. Gayheart's not objecting to the motion, but that a special jury instruction will be drafted between the parties and, with the agreement of the Court, presented to the jury containing the elements necessary for [a finding that Michigan has jurisdiction.]

(10-11-07 Motion Hearing 22, l. 25 - 25, l. 1; 27, ll. 3-7)(highlighting and emphasis supplied)

Averting structural error is the core rationale for "the initial gatekeeping function", People v. Gay-

heart, *supra*, 285 Mich. App. at 211, that trial judges must discharge when M.C.L. 762.2 is the basis for exercising jurisdiction. That function, constitutionally rooted, vindicates the public interest in ensuring the integrity of Michigan's criminal justice system.

Allowing a defendant to manufacture jurisdiction where none exists would frustrate this objective.

It follows that the scope and construction of M.C.L. 762.2 remains ripe for appellate review despite Gayheart's preference, for unstated reasons of his own,[3] that it not be litigated.

The Massachusetts Supreme Judicial Court addressed a variant of this in Commonwealth v. Woodward, 427 Mass. 659; 694 N.E.2d 1277 (1998).

At issue in Woodward was whether a murder defendant could veto the prosecutor's request for a manslaughter instruction. The defense insisted that the jury be given the choice between murder in the first

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[3] The undersigned has not inquired about or discussed those reasons either with Mr. Gayheart or any of his trial or appellate counsel. However, one can surmise. The jurisdictions other than Michigan that potentially could have prosecuted this case are Indiana and the United States. Both, unlike Michigan, have the death penalty for first-degree murder. It

or second degree, on the one hand, or a not guilty verdict. The trial judge acquiesced in that request. However, when the jury convicted Woodward of second-degree murder, he granted post-judgment relief[4] reducing her conviction to involuntary manslaughter.

The Court held that the trial judge erred in acceding to Woodward's request not to instruct the jury on manslaughter:

> Our conclusion that the Commonwealth was entitled to a manslaughter instruction is fortified by the policy favoring instructing juries on lesser included offenses. ***The doctrine serves the public purpose of allowing the jury to convict of the offense established by the evidence, rather than forcing them to choose between convicting the defendant of an offense not fully established by the evidence or acquitting, even though the defendant is guilty of some offense.*** ... The jury, in reaching their verdict, surely must have concluded that the Commonwealth had proved beyond a reasonable doubt the element of causation -- that Woodward's acts caused Matthew's fatal injury. By refusing to accede to the Commonwealth's request for a manslaughter instruction, the judge impermissibly prevented the jury from considering a lesser degree of culpability for Woodward.

427 Mass. at 664-665 (citation and footnote omitted) (highlighting and emphasis supplied).

Justice Greaney, dissenting in part on other

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would be rational for Mr. Gayheart to avoid making this a capital case.

[4] Mass. R. Crim. P. 25(b)(2).

grounds for himself and Justices Abrams and Ireland, observed:

> What further sets this case apart from most if not all, others is that this chain of events was set in motion by Woodward, who, after examination in open court, and with the assistance and advice of her lawyers, knowingly and voluntarily agreed to the choices that would be given to the jury. ... Woodward's tactics, with the judge's approbation, transformed the trial from a search for the truth to a high stakes game of chance.

427 Mass. at 691.

Jury instructions rather than jurisdiction were the focus of Woodward. However, the vice there was the same as would be present here if this Court holds that the Gayheart's challenge to M.C.L. 762.2 is not preserved for appeal. A criminal defendant would have gamed the justice system for personal advantage. That outcome most certainly would "[affect] the public reputation of judicial proceedings." People v. Thomas, *supra*, 260 Mich. App. at 454.

II

ASSUMING *ARGUENDO* THAT THE DEFENDANT'S PERSONALLY EXPRESSED DESIRE THAT JURISDICTION NOT BE CONTESTED RENDERS THE ISSUE, IT STILL SHOULD BE REVIEWED BY THIS COURT BECAUSE IT IS CAPABLE OF REPETITION BUT EVADING REVIEW.

In People v. Edwin Dewayne Richmond, No. 136448,

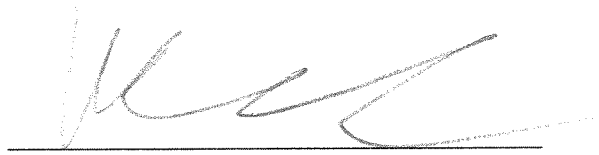
pp. 3-4, 7 (Michigan Supreme Court, April 30, 2010) (dicta)(slip opinion), this Court reaffirmed that some moot cases should be reviewed because the issue posed in them "is one that pertains to similarly situated defendants, and is capable of repetition, yet may evade judicial review." People v. James, 272 Mich. App. 182, 184; 725 N.W.2d 71 (2006), citing Federated Publications Inc. v. City of Lansing, 467 Mich. 98, 112; 649 N.W.2d 383 (2002).

Any person charged with first-degree murder under the circumstances of this case, i.e., where all of the competing jurisdictions with a colorable claim to prosecute the case have the death penalty, has a clear incentive not to contest the application of M.C.L. 762.2. The construction and application of that statute "involves legal principles of major significance to the state's jurisprudence." M.C.R. 7.302(B)(3). This Court accordingly should utilize Gayheart's case to clarify this matter for the bench and bar. Cf. People v. Xiong, 483 Mich. 951, 952-954; 764 N.W.2d 15 (2009)(Kelly, C.J., with whom Cavanagh, J., joins, dissenting)(lower courts are entitled to guidance in handling "other acts" evidence when its admission is authorized by M.C.L. 768.27a)

RELIEF

For the above reasons, this Court should find that Gayheart's challenge to M.C.L. 762.2 is not moot.

DATED: April 30, 2010



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